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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ATINDER PAL SINGH,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-76259

Agency No. A75-251-546

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted April 5, 2006^{**}

Before: HAWKINS, McKEOWN, and PAEZ, Circuit Judges.

Atinder Pal Singh (“Singh”), a native and citizen of India, petitions for review of the Board of Immigration Appeals’ (“BIA”) decision denying his motion to reopen deportation proceedings in order to apply for adjustment of status. We

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). The panel referred this case to mediation by the court’s mediation office, which was unsuccessful.

have jurisdiction pursuant to 8 U.S.C. § 1252. *Sotelo v. Gonzales*, 430 F.3d 968, 970 (9th Cir. 2005). Reviewing for abuse of discretion, *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1187 (9th Cir. 2001) (en banc), we grant the petition and remand for further proceedings.

The BIA abused its discretion in concluding that the late filing of Singh's motion to reopen was not excused by ineffective assistance of prior counsel, Randhir Kang, and instead constituted a lack of due diligence by Singh. A motion to reopen is due "no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened." 8 C.F.R. § 1003.2(c)(2). The INS's letter of March 3, 2003 about Singh's adjustment of status application did not state that his appeal to the BIA had been dismissed on June 5, 2002. Several months later, Singh sought and then retained new counsel. He filed the motion to reopen at issue diligently after being informed that Kang did not communicate the BIA's decision to him. Equitable tolling therefore rendered Singh's motion timely. *See Fajardo v. INS*, 300 F.3d 1018, 1022 (9th Cir. 2002).

On the merits of the motion to reopen, Singh has substantially complied with the requirements of *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). As Kang's ineffectiveness denied Singh the opportunity to petition for review of the BIA's

dismissal of his appeal and to file a timely motion to remand for consideration of his adjustment of status application, a presumption of prejudice arises which is not rebutted where a petitioner demonstrates plausible grounds for relief. *See Siong v. INS*, 376 F.3d 1030, 1037-38 (9th Cir. 2004). Through his adjustment of status application, Singh has shown plausible grounds for relief at the time the BIA dismissed his appeal. Adjustment of status was the only form of relief considered by the BIA in its decision under review, so we do not address Singh's arguments concerning his asylum and withholding of deportation application.

Without expressing an opinion as to the merits of Singh's claimed relief, we remand with directions that his proceedings be reopened. *See Singh v. Ashcroft*, 367 F.3d 1182, 1190 (9th Cir. 2004).

PETITION FOR REVIEW GRANTED; REMANDED.